

DOCKET FILE COPY ORIGINAL

June 11, 1998

RECEIVED  
JUN 15 1998  
FCC MAIL ROOM

Richard L. Harvey  
WBHX  
1018 Hillcrest Drive  
Neshanic Station, New Jersey  
08853

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: MM Docket 98-43

Dear Ms. Salas:

Attached please find the original and nine copies of our **Comments on the Notice of Proposed Rule Making** on MM Docket No. 98-43.

Sincerely,

  
Richard L. Harvey

9 enclosures

No. of Copies rec'd 0 + 8  
List A B C D E

before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL  
**RECEIVED**  
JUN 15 1998  
FCC MAIL ROOM

In the Matter of )  
 )  
1998 Biennial Regulatory Review -- )  
Streamlining of Mass Media Applications, )  
Rules, and Processes )

MM Docket No. 98-43

**COMMENTS ON THE NOTICE OF PROPOSED RULE MAKING**

The Commission in the subject Notice of Proposed Rule Making ("NPRM") is considering, among other actions, whether to modify construction permit extension procedures. In the NPRM the commission proposes to lengthen the initial construction permit period to three years, to discontinue the "one-in-three" showing that the Commission uses to allow permit extensions, and to extend permits only when the permit itself is subject to administrative or judicial review or when delays were caused by an "act of God".

The Commission seeks comments as to whether difficulties in obtaining local zoning authorization is sufficiently beyond the permittee's control to warrant treatment similar to that of delays caused by administrative and judicial review. The NPRM states that the Commission's "tentative conclusion is that zoning delays can be overcome and

construction can be completed within the proposed three-year construction period if a permittee pursues the zoning process diligently.” Our comments are directed at this point. WBHX in an unbuilt Class A (1989 Grandfathered) FM station. We have diligently pursued local approvals for a transmitting site for over four years\* . Below we discuss why the Commission should continue granting extensions for zoning problems. Also we suggest that the Commission increase the extension time period when zoning problems are encountered.

### ***The Permittee Doesn't Control the Zoning Process***

Based on our experience, when a Commission permittee applies for local zoning approval for a tower site, there is no way to predict or know the outcome at any step or even how much longer the process could take. In a few rare cases, the application might be approved at the first hearing. More likely, the applicant will need to attend many hearings (7 in our case) and produce expert witnesses. The zoning board and opposition may also have expert witnesses appear. This process would take one, two or more years depending on the zoning board's schedule and work load. In the end, the zoning board would vote its approval or not. In either case, after the decision has been published, the decision could then be appealed to a lower level Court. In some cases, the permittee may gain zoning board approval, but other opposing parties would appeal the decision preventing the permittee from building.

---

\* The WBHX proposed site was centered within a 69 acre fully wooded property bordered by state forest. The zoning board felt that the tower should be located in a more populated area closer to those that would be using the radio station. There are no tall structures in this area.

When the zoning board decision is appealed to the lower level court, additional delays would be encountered. In the case of WBHX's appeal, our case was heard 16 months after we had filed. During this period, the opposition had requested four time extensions. The Judge took an additional two months to reach a decision. Thirty-six months elapsed between the date when we filed the zoning application and the date we received the lower court decision.

Since there is little precedent for zoning of broadcast towers in New Jersey case law, the appeal was not successful. All the recent New Jersey Supreme Court decisions that guide the lower courts and the zoning boards have involved cellular or PCS towers. In our case, the Superior Court Judge ruled that broadcast towers cannot be considered covered by recent tower decisions that benefit cellular or PCS tower proposals. In order to obtain approval for our tower site, appeals to a higher court will be required.

Even though we had diligently pursued the zoning process, we were not able to impact the time the process took nor determine the outcome at each step.

### ***Not Granting Extensions for Zoning Problems Would Frustrate the Zoning Process***

The zoning process at the local level requires the local officials to work within the land use laws as interpreted by state and federal courts. The Zoning Board makes decisions knowing that its' decisions are subject to the review of the courts. As such, most zoning boards strive to make decisions which will stand up to court review. If the Commission creates a drop-dead dateline by not providing extensions for zoning difficulties, local zoning officials would work in an environment where the officials and

any opposing groups will know that if they delay the decision long enough, their decision will not be subject to court review.

In some cases, the zoning board could conceivably withhold its decision till the last months of the construction permit period and then grant approval knowing that there is no time left to construct. That way the board could meet its legal obligation but still ensure that the tower is not built. Even if approval is granted by the zoning board in a timely manner, opposing groups could appeal that decision causing further delays. By not granting extensions due to zoning problems, the Commission would be allowing the zoning process to fail.

The result would also frustrate the Commission's goals. Once the Commission assigns a facility to a permittee, the zoning board could delay the process and then deny the application without time for appeal. The result would be the elimination of the assignment. If the allocation were then made available to a new applicant, the process would start again. There is potential for a FCC/Zoning Board revolving door. There is also the potential that unsuccessful Commission applicants could interfere with the zoning process and cause delays such that they could then get a second chance with the Commission once the assignment is canceled.

### ***Not Granting Extensions for Zoning Problems Would Prevent New Court Guidelines***

Over the last few years, New Jersey Courts, including the New Jersey Supreme Court, have issued rulings providing guidelines to lower courts and zoning boards on how to interpret NJ land use law when considering some towers. These decisions were made

as a result of appeals of lower court decisions and zoning board decisions by a licensee or permittee of the Commission. These decisions may not apply to broadcast towers (in our case the lower court Judge ruled they didn't). In order for the courts to clarify the status of broadcast towers under New Jersey law, it will be necessary for broadcast permittees to go through the process of appealing lower court and zoning board decisions. If the Commission did not grant extensions for zoning problems, no permittee would have sufficient time to work through the system. As a result, zoning boards and lower level courts would not have guidelines to work from. The zoning process for broadcast facilities would remain uncertain and broadcast permittees would not benefit from the recent court decisions that affected other towers.

#### ***Not Granting Extensions for Zoning Problems will Abort the Zoning Process***

In some states, in some locations, there are two or more levels of planning authority. In New Jersey, some locations are subject to county and state review in addition to local review. Some sites, particularly AM broadcast sites that often involve wetlands, require additional time. These issues are very much site dependent and the proposed three years (for all construction) which the NPRM seeks to establish would not provide sufficient time in many cases -- perhaps most cases when a new tower is proposed.

#### ***Increasing the Extension Period when there are Zoning Problems***

The Commission in the NPRM is looking to streamline the process of extending construction permits. From our experience, once the permittee is tied up in the zoning

process, a longer extension period would be beneficial and could speed up the process and would reduce the Commission's workload. We are convinced that many of the delays we encountered were attempts by opposing forces to delay the process past the then current expiration date of our construction permit. The hope on their part was that the Commission would deny our extension request.

In our case, we had informed the zoning board of our construction permit expiration date during an informal meeting, hoping that the board would consider our application in a timely manner. Instead the board waited well past the construction permit expiration date before scheduling our first hearing. At that hearing, the board asked questions about and discussed the Commission's policy on granting extensions. The Board wanted to know how the permit was extended and if it could be extended again.

After we appealed the zoning board decision, the delays requested by the zoning board (and granted by the Judge) were likely requested to cause the court decision to be delayed beyond the expiration date of the then current construction permit. A longer extension period of 12 months or more would make it more difficult for opposing forces to justify delays which extend beyond the construction permit expiration date.

### ***The Commission Must Act to Ease the Zoning Problem***

The Commission has under consideration Docket 97-182 which addresses zoning preemption. We had filed comments on this docket suggesting that the Commission should consider allowing additional flexibility in its' rules to resolve specific zoning problems. The current problems stem from greater competition for tower space from

Cellular and PCS. The difficult zoning situations are also a result brought on by the boom in Cellular and PCS. Zoning officials are now less likely to allow additional towers into their communities and they view broadcast towers as “more undesirable” than cellular or PCS towers since broadcast towers are generally taller and operate at higher power.

Our zoning difficulties also result from the fact that the Commission’s rules and state/local land use rules are in conflict. This has made it very difficult to locate suitable properties and even more difficult to obtain the required local approvals. If the Commission provided for additional flexibility of its’ rules to help resolve the zoning problems, more stations could be built without the extensive zoning delays. This could be done by empowering a mediator to waive some of the Commission’s rules where this can be done without compromising the technical quality of the broadcast service.

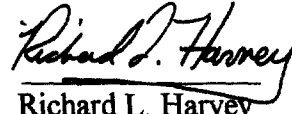
### ***Summary***

Permittees have little or no control over what happens in the local permitting process. The Commission needs to continue the policy of granting extensions when an applicant faces problems obtaining local permits. A longer extension period when zoning issues are involved could be useful in reducing the Commission’s work load (zoning problems usually take much more time than 6 months to be resolved) and may help expedite court action. In addition, the Commission needs to take action to help resolve the antenna siting issue. The process today is costly and slow, taking in our case four or more years in the zoning process. And after such a long process, there is no assurance of



a successful conclusion. The Commission should consider acting as a mediator, providing for some additional flexibility of its rules to help resolve tower siting disputes.

Respectfully submitted,

  
Richard L. Harvey  
WBHX  
1018 Hillcrest Drive  
Neshanic Station, NJ  
08853

June 11, 1998

## **Appendix A**

### *Timeline*

Apr., 1992	Initial Construction Permit Issued.
Feb., 1994	Replacement Construction Permit Issued.
March, 1994	Informal Hearing with the Zoning Board was held.
June, 1994	Zoning Application is made.
March 23, 1995	First Zoning Hearing is held.
March 30, 1995	Second Zoning Hearing.
April 11, 1995	Third Zoning Hearing.
May 25, 1995	Fourth Zoning Hearing.
July 25, 1995	Fifth Zoning Hearing
August 8, 1995	Sixth Zoning Hearing
Sept., 1995	Draft of Zoning Board Decision received
Oct. 5, 1995	Zoning Board Publishes its Decision
Nov. 17, 1995	Filed Suit in Superior Court
July, 1996	Conference with Judge - Asked for case to be expedited
Oct., 1996 - Feb., 1997	There were numerous delays. One delay was caused by the need to reconstruct a tape which arrived damaged from the Zoning Board. The Zoning Board's attorney requested and received four extensions of the hearing date. The Judge then rescheduled the hearing on his own motion resulting in an additional one-month delay.
March 24, 1997	Court Hearing
April, 1997	Court was not provided many of the zoning exhibits by the Zoning Board. We needed to make new ones.
May 28, 1997	The Judge issues his decision denying the appeal.

The total time from initial zoning application to receiving a negative court decision was 36 months.

July 11, 1997            Filed an Appeal to the Superior Court - Appellate Division.

If the appeal is successful, WBHX will still need to apply to the Zoning Board for final site approval. WBHX is proceeding to relocate its' transmitter site in an attempt to expedite the approval process.